Supreme Court, U.S.
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No. 09-

In the Supreme Court of the United States

BACILIO A. AMORRORTU,

Petitioner

v.

REPUBLIC OF PERU,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The
Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

BACILIO A. AMORRORTU
2402 South Voss Rd.
Apt No. B-301
Houston, Texas 77057
Phone: (281) 455-5062
Petitioner
PRO SE

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Petitioner failed to demonstrate that the negotiations held by Petitioner and the Respondent, represented by the Swiss Bank Corp. New York Branch ("SBC"), under Peru's Brady Plan, and a contract signed under this Plan where Petitioner is a signatory party and where the other party is the Respondent, do not satisfy the commercial activity exception to the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605.

2. Whether the court of appeals erred in holding the District Court's analysis of the waiver and expropriation exceptions to the FSIA, without consideration that the aforementioned contract was governed by the Laws of the State of New York, and the fact that this contract was unfulfilled due to political reasons, representing a violation of international law.

3. Whether the court of appeals erred in holding, in reference to this aforementioned contract, that Petitioner's claims are time-barred, without considering that political asylum, meaning protection, granted to Petitioner by the INS, U.S. Department of Justice, tolled the statute of limitations, and when the cause of action accrued.

4. Whether the court of appeals erred in holding the reasons stated by the District Court which did not permit a pro se Plaintiff, the Petitioner, to remand the complaint to clarify the facts occurring in the United States.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Parties to the proceedings appear on the cover of the petition.

Petitioner, Bacilio A. Amorrortu, individually filed his complaint as a pro se Plaintiff. He is not a corporation and no corporation related to him is involved in this case.

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The opinion of the court of Appeals (Pet App. 26a-27a) is unreported but available electronically through the Pacer System at DC CM/ECF LIVE – US District Court –Texas Southern webpage. The district court's memorandum and order granting Respondent's Motion to Dismiss Judgment (Pet. App. 1a-21a) is reported at 570 F.SUPP. 2d 916.

JURISDICTION

Petitioner seeks review of a final decision and judgment of the United States Court of Appeals for the Fifth Circuit entered on May 28. 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunity Act of 1976, 28 U.S.C §§ 1602 et seq. ("FSIA"), N.Y. C.P.L.R § 213(2). N.Y. C.P.L.R § 214(4), N.Y. C.P.L.R § 214(5). and 28 U.S.C § 1350 Torture Victim Protection Pub. L. 102-256. Mar 12. 1992, 106 Stat. 73.

STATEMENT OF THE CASE

1. Petitioner, individually, victim of political persecution, seeks review of the Court of Appeals for the Fifth Circuit's decision and judgment entered on May 28, 2009 rejecting his appeal of the dismissal of his claims for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1). The Circuit Judges, for the reasons stated by the district court, concluded that Petitioner failed to allege a sufficient basis for jurisdiction under the Foreign Sovereign Immunities Act, FSIA. See 28 U.S.C. § 1605. Accordingly, the Circuit Judges affirmed the District Court's order and judgment in which the court stated that Petitioner has not carried his burden of showing that one of the exceptions to the FSIA's grant of sovereign immunity applies. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1254(1).

Petitioner, a petroleum engineer, very successful oil business man, founder and leader in Peru of a political party named "En Accion" was granted political asylum in 2001 by the INS, U.S. Department of Justice, acknowledging Petitioner as a victim of political persecution executed in the United States in the 1990's by the repressive regime of Peru's President, Fujimori. These facts are formally documented and described in the 510 page asylum complaint filed on March 09, 2000.

The political persecution against Petitioner was executed by Fujimori's repressive regime because Petitioner had become a serious and significant contender for the Peruvian presidency. Peru acknowledged, in its response before the Court of Appeals, that the Petitioner ran for President of Peru. Fujimori's repressive regime governed Peru from 1990 to 2000 when he abandoned the office due to charges of murder and corruption. Fujimori was arrested in Santiago de Chile and then extradited to Peru on September 22, 2007. Fujimori has since been convicted and imprisoned in Lima, Peru for 25 years for murder, human rights violations and corruption, while the victim, Petitioner, extremely damaged, continues to seek for justice and remedy before the United States' courts.

Petitioner visited the United States frequently. The aforementioned political persecution against Petitioner occurred in the United States when Petitioner negotiated and signed a contract on October 27, 1995 with the Respondent, represented by the commercial bank SBC, under Peru's Brady Plan 1995-1997. SBC is now operating as UBS Bank. This contract, to collect debts and monies owed to Petitioner, as individual, and Petitioner's oil company, Propetsa, in which Petitioner is a signatory party, was governed by, and construed in accordance with, the Laws of the State of New

York The breakdown of the debts and monies involved show the amounts owed separately to Petitioner and to Propetsa. This aforementioned contract and the breakdown of the contract debts and monies involved are included in the Exhibits docketed in the District Court.

The Brady Plan, named for former United States Secretary of Treasury Nicholas Brady, was a Plan promoted by the United States to help developing countries by reducing outstanding debts, many filed as claims, owed to US commercial banks, private corporations, and others. One of the direct effects of this plan in the United States. was that monies recovered were to be reflected in the creditors' financial statements and U.S. tax returns One of beneficiaries of this plan was Peru and the plan was named Peru's Brady Plan. Under this Plan, executed during 1995 and 1997, the Respondent's debts and claims owed to US commercial banks. private corporations and others were reduced in an amount of US$6 13 Billion. These commercial operations permitted US commercial banks, corporations and others. including Petitioner. to end claims against Respondent and to recover monies due in cash and / or bonds. The details of these commercial

operations are included with the Exhibits docketed in the District Court.

In the morning of December 5. 1996. in a meeting in the office of SBC's New York Headquarters. SBC's Executive Director told Petitioner that the Bank could not pay him due to political reasons in relation to an order received from the repressive regime of Peru's President Fujimori. Petitioner told SBC that he did not understand what was happening. This was a contract, signed by Petitioner and the Respondent, represented by SBC, that was being vetoed by Peru's President Fujimori during Peru's Brady Plan. This was an unacceptable reason for Petitioner. For Petitioner, the term "political reasons" was unacceptable under the Laws of the State of New York, in the United States. and during a commercial transaction under Peru's Brady Plan.

This was political persecution executed against Petitioner in the United States by the repressive regime of Peru's President Fujimori. This fact forms the basis of the case and the complaint. and constitutes a clear violation of the individual civil and constitutional rights of Petitioner under rule of law of the United States. In addition. the Respondent. although requested by the Petitioner.

did not present the testimony of SBC's Executive Director.

This case is a complaint of Petitioner's civil rights violations and injuries suffered seeking individual monies and damages due to the aforementioned facts. This case is not a complaint of Petitioner on behalf of his oil company Propesta to recover his oil assets and damages nor of the liabilities of the Respondent in the death of his wife.

On December 19, 1996, while based in Houston, Petitioner received a unilateral termination letter from SBC. in which SBC ended the October 27. 1995 signed contract. Neither Petitioner nor Propetsa were paid.

After the closing of the Peru's Brady Plan on March 7, 1997. Petitioner returned to Peru. On March 21, 1999, a statement appeared in the main Peruvian newspaper "El Comercio" disclosing full details of participants and amounts involved in Peru's Brady Plan. The details of this disclosure are included with the Exhibits docketed in the District Court. This was not a simple article. It was an official public statement written in the Respondent's format including the official governmental seal and signed by the Respondent's Minister of Economy and Finance. This statement describes how the Respondent represented by SBC

purchased Peruvian debts to private creditors through commercial contracts, such as the Petitioner's contract, clearly identifying the Respondent as a party to these contracts.

In 1999, Petitioner, exhausted and under substantive threat of death received from Fujimori's repressive regime, fled with his family from Peru and came to the United States seeking political asylum and justice. On March 9, 2000, Petitioner filed a 510 page political asylum complaint before the INS U.S. Department of Justice which included a description of the facts and civil rights violations executed by the Respondent against him in the United States.

On January 29, 2001, after review of the political asylum complaint and hearings before an Immigration Court, the INS U.S. Department of Justice granted Petitioner and his family political asylum, ratifying that Petitioner had been a victim of political persecution and civil rights violations executed by the Respondent in the United States. This aforementioned asylum decision is included with the Exhibits docketed in the District Court. The political asylum process continued until August 23, 2005, when Petitioner received his Lawful Permanent Resident Status and was able to file a lawsuit against the Respondent seeking justice before the United States Courts. Prior to

this date, that is during the five years of the political asylum process which means "protection", Petitioner was unable to file a complaint against the Respondent before the United States courts. This aforementioned Lawful Permanent Resident decision is included with the Exhibits docketed in the District Court.

II. On December 19, 2006, Petitioner, individually, as pro se Plaintiff, victim of political persecution, extremely damaged, filed a lawsuit against the Respondent. The nature of the action is to seek damages, monies and reimbursement in the amount of Thirty Seven million U.S. dollars, and what the Court deems just and proper to be paid by the Respondent.

On March 16, 2007 in an Initial Conference, and on July 10, 2007, in an Evidentiary Hearing, Petitioner explained his case to the Court. Petitioner submitted an exhibit list and book containing 49 exhibits.

On October 30, 2007, the Respondent filed a Motion to Dismiss citing the FSIA, the act of state doctrine, inconvenient forum grounds, and international comity grounds. Then, on November 19, 2007 Petitioner filed a response to the Motion to Dismiss. Subsequently, on November 27, 2007 the Respondent filed a final reply.

On July 31, 2008 the District Court issued a Memorandum and Order, and a Final Judgment dismissing the case for lack of subject matter jurisdiction. The District Court concluded, "The Court harbors no doubts that Amorrortu's complaints about his treatment by the Republic of Peru are voiced in earnest, and that his feelings of aggrievement are real. This Court, however, may not act in the absence of jurisdiction, and Amorrortu has not carried his burden of showing that one of the exceptions to the FSIA's grant of sovereign immunity applies." Pet. App. 21a. The District Court held in its Memorandum and Order that the case lacks subject matter jurisdiction under Rule 12(b)(1) and the FSIA, and therefore the case must be dismissed. Petitioner filed a Notice of Appeal on August 28, 2008.

On January 6, 2009, Petitioner filed a Brief of Appellant before the United States Court of Appeals for the Fifth Circuit stating five issues where the District Court erred. The Respondent filed a Brief of Defendant on February 18, 2009, and Petitioner filed a Reply Brief on March 04, 2009. On May 28, 2009, the Court of Appeals held "For the reasons stated by the district court, we conclude that Amorrortu has failed to allege a sufficient basis for jurisdiction under the Foreign Sovereign Immunities Act. See 28 U.S.C. § 1605...Accordingly, we AFFIRM." Pet. App. 25a.

The Court of Appeals erred in holding the reasons stated by the District Court analysis to determine the commercial activity exception to the FSIA omitting to consider facts occurring in the United States, while considering the facts which occurred in Peru: non-payment of a debt in Peru: confiscation of Propetsa assets in Peru; and political persecution of Petitioner in Peru; citing the Can-Am Intn'l v. Republic of Trinidad and Tobago, 169 F.App'x 396 (5th Cir. 1973) case. The Can-Am case, reviewed by the Court of Appeals for the Fifth Circuit, is based on a contract signed under the laws of the country of Trinidad and Tobago. contrary to Petitioner's case, which is based on a contract signed by a Plaintiff -Appellant under the Laws of the State of New York during Peru's Brady Plan The facts that occurred in Peru, and the rights of Propetsa should not be part of the analysis of this case.

In the Can-Am Intn'l case, reviewed by the Court of Appeals for the Fifth Circuit, the Plaintiff did not sign a contract under the Laws of the United States or during the Brady Plan. This case is completely different to the Petitioner's case. which is based on facts that occurred in the United States.

The Court of Appeals erred in holding the District Court decision without consideration of the

evidence, the 49 exhibits, filed on the record, and released to the Respondent by the Court of Appeals. This evidence was reviewed by the Respondent and some of this evidence is mentioned in their Brief. The evidence (the contract, among others) is mentioned in the Complaint, and in Petitioner's response (Memorandum of Points) to the Defendant's Motion to Dismiss. The Respondent, before filing its Motion to Dismiss the Complaint, knew of the existing exhibits on record, which included the Petitioner's contract, the breakdown of the amounts to be paid, the disclosure of the details of Peru's Brady Plan, and how the Respondent was involved in the purchase of the private debts included in the Plan.

The Respondent admitted in its response filed before the Court of Appeals, that the Petitioner is a signatory party in the aforementioned contract, signed on the October 27, 1995 which included the terms established by Peru's Brady Plan. They also admit that SBC represented the Respondent in the negotiations and purchase of debts during Peru's Brady Plan.

It has been established in United States courts that on the same day October 27, 1995 other Peruvian debts were purchased, and subsequently paid, in accordance with Peru's Brady Plan.

The Court of Appeals erred in holding the District Court's analysis of the waiver exception to the FSIA. without consideration that the aforementioned contract was governed by the Laws of the State of New York. thus establishing an explicit waiver to immunity. The Court of Appeals also erred in holding the District Court's analysis of the expropriation exception to the FSIA without consideration of the fact that this contract was unfulfilled due to political reasons, representing a violation of international law, and therefore the expropriation exception to the FSIA.

The Court of Appeals erred in holding, in reference to this aforementioned contract. that Petitioner's claims under the Laws of the State of New York are time-barred, without considering that the political asylum. meaning protection. granted to Petitioner by the INS. U.S. Department of Justice, tolled the statute of limitations. and when the cause of action accrued.

Finally. the Court of Appeals erred in holding the reasons stated by the District Court which, in its analysis, considered only the facts that occurred in Peru. and omitted to consider the evidences and facts executed during Peru's Brady Plan against Petitioner in the United States by the repressive regime of Peru's President, Alberto Fujimori, under the Laws of the State of New York. and did not

permit a pro se Plaintiff , the Petitioner, to remand the complaint to clarify the facts occurring in the United States, which are the basis in proving exceptions to the FSIA in this case, about which the District Court stated "[t]he Court is not entirely clear about the meaning of these allegations". Pet. App. 4a.

The facts and evidences ratify: that the Respondent, through a contract signed during Peru's Brady Plan, had engaged in commercial activity; that the Respondent waived its immunity because the contract was signed under the Laws of the State of New York; that the statutes of limitations in attention to the New York Law are not time barred, and that the non payment of the debt owed to Petitioner was due to political reasons and was an act of expropriation. Therefore, Petitioner carried his burden of showing that one of the exceptions to the FSIA's grant of sovereign immunity applies and the Writ for Certiorari should be granted.

REASONS FOR GRANTING THE PETITION

I. This Case Is Important and Warrants Review

This is the most important and unusual FSIA case in regards to a United States political asylum granted Plaintiff, who signed a contract with the Respondent represented by the commercial bank SBC during the Peru's Brady Plan under the Laws of the State of New York, to recover individual monies. The Petitioner, individually, a pro se Plaintiff, is a victim of political persecution executed in the United States by the repressive regime of Peru's President Fujimori acknowledged by the INS United States Department of Justice which in 2001 granted him political asylum in accordance with the Universal Declaration of Human Rights and international law adopted on December 10, 1948 by the General Assembly of the United Nations that is part of the United States rule of law.

The political persecution in the United States began on the morning of December 5, 1996, when in a meeting in the office of SBC's New York Headquarters, SBC's Executive Director told Petitioner that the Bank could not pay him due to political reasons in relation to an order received from the repressive regime of Peru's President Fujimori. Petitioner told SBC that he did not understand what was happening. This was a

contract, signed by Petitioner and the Respondent, represented by SBC, that was being vetoed by Peru's President Fujimori, during Peru's Brady Plan. This was an unacceptable reason for Petitioner. For Petitioner, the term "political reasons" was unacceptable under the Laws of the State of New York, in the United States, and during a commercial transaction under Peru's Brady Plan. This was political persecution executed against Petitioner in the United States by Peru's President Fujimori. This fact forms the basis of the case and the complaint, and constitutes a clear violation of the individual civil and constitutional rights of Petitioner under rule of law of the United States. In addition, the Respondent, although requested by the Petitioner, did not present the testimony of SBC's Executive Director.

Peru's former President Fujimori was arrested and sentenced to 25 years in prison convicted for murder and corruption. He was the head of a repressive regimen in Peru during 1990 to 2000 and one of the repressive acts and wrongdoings of his regime was against the Plaintiff in the United States, because the Plaintiff had become a serious and significant contender for the Peruvian presidency. Peru acknowledged, in its response before the Court of Appeals, that Petitioner ran for President of Peru.

This is the first case related to the FSIA to be brought before the United States courts in which a Plaintiff signed a commercial contract with a Foreign State under the Laws of the United States.

The Court of Appeals erred in holding the reasons stated by the District Court analysis to determine the commercial activity exception to the FSIA omitting to consider facts occurring in the United States, while considering the facts which occurred in Peru: non-payment of a debt in Peru; confiscation of Propetsa assets in Peru; and political persecution of Petitioner in Peru; citing the Can-Am Intn'l v. Republic of Trinidad and Tobago. 169 F.App'x 396 (5th Cir. 1973) case. The Can-Am case, reviewed by the Court of Appeals for the Fifth Circuit, is based on a contract signed under the laws of the country of Trinidad and Tobago, contrary to Petitioner's case, which is based on a contract signed by the Petitioner under the Laws of the State of New York during Peru's Brady Plan. The facts that occurred in Peru, and the rights of Propetsa should not be part of the analysis of this case.

In the Can-Am Intn'l case, reviewed by the Court of Appeals for the Fifth Circuit, the Plaintiff did not sign a contract under the Laws of the United States or during the Brady Plan. This case is completely different to the Petitioner's case.

which is based on facts that occurred in the United States.

The FSIA was enacted to determine whether a Foreign State is entitled to immunity and, if a foreign defendant qualifies as a "Foreign State" under the FSIA, the Act provides that it shall be immune to suit in any United States Court, federal or state, unless a statutory exception immunity applies. The Supreme Court held that the Foreign Sovereign Immunities Act provides the "sole basis for obtaining jurisdiction over a foreign state" in Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

The purpose of Congress in enacting the FSIA was to prevent cases being filed before the United States courts based on facts which occurred outside the borders of the United States. All the cases mentioned by the Respondent in their Brief filed before the Court of Appeals and the District Court are based on facts and contracts which occurred outside the United States. This is contrary to the situation regarding the Petitioner's case which is base on facts occurring in the United States under the Laws of the State of New York.

The Court of Appeals erred in holding the reasons stated by the District Court which, in its analysis, considered only the facts that occurred in Peru, and omitted to consider the evidences and

facts executed during Peru's Brady Plan against Petitioner in the United States by the repressive regime of Peru's President, Alberto Fujimori. under the Laws of the State of New York, and did not permit a pro se Plaintiff, the Petitioner, to remand the complaint to clarify the facts occurring in the United States, which are the basis in proving exceptions to the FSIA in this case, about which the District Court stated "[t]he Court is not entirely clear about the meaning of these allegations". Pet. App. 4a.

This is the most important case related to a wrong executed by a Foreign State during the negotiations of one of the most important economic and financial plans called the "Brady Plan". The Brady Plan. named for former United States Secretary of Treasury Nicholas Brady. was a Plan promoted by the United States to help developing countries by reducing outstanding debts, many filed as claims, owed to US commercial banks, private corporations, and others. One of the direct effects of this plan in the United States, was that monies recovered were to be reflected in the creditors' financial statements and U.S. tax returns. One of beneficiaries of this plan was Peru. and the plan was named Peru's Brady Plan. Under this Plan, executed during 1995 and 1997, the Respondent's debts and claims owed to US commercial banks. private corporations and others

were reduced in an amount of US$6.13 Billion These commercial operations permitted US commercial banks, corporations and others, including Petitioner, to end claims against Respondent and to recover monies due in cash and / or bonds. While the repressive regime of Peru's President Fujimori received the aforementioned benefits of reducing these extraordinary debts due to contracts and negotiations executed under Peru's Brady Plan, the commercial contract signed by the Petitioner during this Plan remains unfulfilled due to the political persecution executed against Petitioner by the repressive regime of Peru's President Fujimori.

This is the most important case related to political persecution executed in the United States by a Foreign State against a political leader The Petitioner, as the founder and leader of the political party "En Accion", was a promoter of freedom for his native country Peru. This most important case permits the United States to send a clear message to Peru and to all Foreign States worldwide that the United States is a country committed to the rule of law, to the promotion of freedom and democracy worldwide, and to the protection of the promoters of freedom and democracy, as confirmed by the United States in granting the Petitioner political asylum. In addition, this case permits the United States to send a clear message to Peru and

to all Foreign States worldwide, that the United States is a country committed to wage war against corrupt and murderous dictators and repressive regimes everywhere. In particular, this case permits the United States to send a clear message to Peru and to all Foreign States worldwide that the United States is a country committed to preventing the perpetration of acts of political persecution and wrongdoings executed by a Foreign State inside the United States against a political contender involved in commercial activities.

Fujimori's repressive regime governed Peru from 1990 to 2000 when he abandoned the office due to charges of murder and corruption. Fujimori was arrested in Santiago de Chile and then extradited to Peru on September 22, 2007. Fujimori has since been convicted and imprisoned in Lima, Peru for 25 years for murder, human rights violations and corruption, while the victim, Petitioner, extremely damaged, continues to seek for justice and remedy before the United States' courts.

Petitioner, now a Lawful Permanent Resident of the United States, is living in Houston, extremely damaged, trapped, and seeking justice. Throughout his years in Houston, companies have denied the Petitioner the opportunity to work citing as reasons his "political asylum status", and "for conflict of

interest". In other companies, the reason was "overqualified". The Petitioner is frustrated, his petroleum studies and career ruined, and his health has been deteriorating. Petitioner, extremely damaged, continues to seek for justice and remedy before the United States' courts in order to recover his monies and status and return to his successful career in petroleum engineering and as an entrepreneur in the oil business.

The Respondent Motion to Dismiss based on the FSIA has the objective of attempting to move this case to the Peruvian Judiciary. It is clear from the facts of this case that the judicial system in Peru is incapable of the review of the facts of this case as: they occurred in the United States during Peru's Brady Plan under the Laws of the State of New York, and they are clearly outside the jurisdiction of the Peruvian Judiciary. The Peruvian Judiciary is corrupt and inefficient. In Peru there is no justice. The 2001 U.S. Department of State human rights report about Peru stated that the judiciary has been subject to interference from the executive and is corrupt and inefficient. The aforementioned U.S. Department of State statement is included with the Exhibits docketed in the District Court.

Considering the aforementioned reasons, this case is important and warrants review.

II. The decision below is in conflict with the decision of another United States court of appeals on the same important matter.

A. U.S. Courts of Appeals rulings have upheld the existence of Peru's Brady Plan, which negotiated and purchased Peruvian debts

In Elliott. the Second Circuit held that "The term "Brady Plan" derives from a March 1989 speech by Nicholas Brady. then Secretary of the United States Treasury, urging commercial lenders to forgive some of the debt that they were owed by less developed countries. restructure what remained. and continued to grant those countries additional loans," Elliot Associates, L.P.. v. Banco de la Nacion and the Republic of Peru, 194 F.3d 363,366 (2nd Cir. 1999).

The S.D.N.Y. Court held that, "[i]n March 1983. Peru determined that it had insufficient foreign exchange reserves to service its foreign debt. and entered negotiations with the Bank Advisory Committee for Peru ("BAC"), a committee consisting of representatives of Peru's major commercial creditors." Elliott Associates. L.P.. v. The Republic of Peru and Banco de la Nacion. 12 F.Supp.2d 328,334 (S.D.N.Y. 1998).

Then, "[i]n 1993, Peru's sovereign debt was approximately $25 billion. which was owed

multinational institutions such as the IMF, the World Bank, and the Inter-American Development Bank; other countries; commercial banks; and suppliers."...."[t]he Term Sheet for Peru's restructuring was negotiated between January and June 1996 and was issued on June 5, 1996. Creditors were required to present commitments to participate in the restructuring by July 31, 1996."..."[o]n November 8, 1996, Peru and its creditors executed an Exchange Agreement implementing Peru's restructuring ("Brady Agreement"), which closed on March 7, 1997." Elliott 12 F.Supp.2d at 335.

The Second Circuit held that, "[u]ltimately, Peru's Brady Plan was agreed upon by 180 commercial lenders and suppliers." Elliott 194 F.3d at 368.

Regarding Peru's Brady Plan, the District Court citing the Complaint said "the agreement was effected under the 'Peruvian Brady Plan.'" which "permitted ...the Peruvian State to solve [sic] and pay claims to private companies,"...and held that "[t]he Court is not entirely clear about the meaning of these allegations." Pet. App. 4a. This admission of the Court was an error which resulted in an improper verdict, considering that the Court held in the introduction of his Order "[a]fter carefully considering the Motion, the responses and replies, thereto, and all applicable law, the Court finds that

it lacks subject matter jurisdiction." Pet. App 2a Petitioner explained these allegations in his Response to Peru's Motion to Dismiss.

B. The Commercial activity exception

Section § 1605(a)(2) of the FSIA sets forth the "commercial activity" exception to sovereign immunity:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-

...

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state: or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States...

The Fifth Circuit explained:

"In order to decide whether the commercial activity applies, first, that the relevant activity must be

identified... [s]econd, the court must determine if the relevant activity is sovereign or commercial...[f]inally, if the relevant activity is commercial in nature, Can-Am Intn'l v. Republic of Trinidad and Tobago. 169 Fed. App'x 396. 404, and "Stena further states. "[n]ot only must there be a jurisdictional nexus between the United States and the commercial acts of the foreign sovereign, there must be a connection between the [Petitioner's] cause of action and the commercial acts of the foreign sovereign."[Stena, 923 F.2d at 386.]"

The question is whether the commercial activity exception applies

Petitioner's case concerns negotiations and an agreement under Peru's Brady Plan. Following the three steps we have:

1. The relevant activity must be identified.

The Court of Appeals erred to identify the relevant activity and omitted Peru's Brady Plan in its analysis, which resulted in an improper verdict, when, in this particular case, the relevant activity is the existence of negotiations held by Petitioner and the Respondent in Peru's Brady Plan and the existence of a contract signed under this Plan. In this contract Petitioner is a signatory party. On the other side of this contract is the Respondent represented by SBC under Peru's Brady Plan.

2. The relevant activity is commercial.

In Elliott. the S.D.N.Y. Court held that. "[o]n October 27. 1995. Peru and the BAC publicly announced an agreement in principle for a debt restructuring plan designed in accordance with the Brady Plan. The agreement covered $4.4 billion face amount of debt virtually all of the external commercial debt owed by Peru and Peruvian public and private-sector debtors," Elliott 12 F.Supp.2d at 335.

Therefore, it has been established in United States courts that on the same day, October 27, 1995, that the Petitioner signed his aforementioned contract. other Peruvian debts were purchased. and subsequently paid, in accordance with Peru's Brady Plan under the law of the State of New York. In addition. during the negotiations of Peru's Brady Plan (1995 - 1997). the Respondent acted under the name of SBC in every commercial transaction and contract carried on during that period of time, under the Laws of the State of New York.

The Court of Appeals knew of the existence of this contract and the evidences of the Case since the moment Petitioner explained his Case in the Evidentiary Hearing held before the District Court on July 10, 2007, and said so on the record[1].

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[1] THE COURT. Let me just mention this in advance. I have to participate in short conference

In this contract Petitioner is a signatory party. He signed this contract as President and CEO of Propetsa to collect the amounts belonging to Propetsa, and signed by himself, writing his complete name, to collect amounts belonging to Petitioner; therefore, the courts below erred holding that "[Petitioner] admits he was not a party" in the mentioned footnote 6, Pet. App. 17a.

On the other end of this contract is the Respondent represented by SBC under Peru's Brady Plan. The contract was signed by an SBC Executive Director. In Elliott, the Respondent's Bank or Banco de La Nacion in Peru's Brady Plan is called "Banco", Elliott 12 F.Supp.2d at 331 In Elliott, "evidence adduced at trial established that beginning in approximately July 1994, and continuing until around the time Peru concluded its Brady

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call at 9 a m So, if we're not done by then, I'll have to excuse myself, but I'll be right back
Okay. I'm familiar with your writing
Anything you would like to add to it, sir?
I'm familiar with what you submitted
Would you like to add to anything to what you've already submitted?

MR AMORRORTU: Yeah, I submitted everything
THE COURT: You want to make a statement?
MR. AMORRORTU: No, I submitted everything.
THE COURT: I have it here
MR AMORRORTU On the list of the 49 evidence

negotiations. Banco set up a program to purchase Peruvian sovereign debt on the secondary market (the "Buyback Program"). The Buyback Program was undertaken under the authority of Banco, although members of the Peruvian government were advised of and approved the program" Elliot 12 F.Supp at 341.

Then, "[t]o execute purchase, Banco issued guidelines to SBC as to the type and amount of debt to purchase and the maximum purchase price. Upon receiving Banco's instructions, SBC solicited sellers in the secondary market within the confines of those instructions. Any holder of Peruvian debt could sell that debt to SBC within the confines of Banco's instruction" Elliott 12 Supp.2d at 341.

In Pravin Banker, the S.D.N.Y. Court held that "Peru is said to be acting through an intermediary Swiss bank to effect the repurchase". Pravin Banker Associates LTD v. Banco Popular del Peru and the Republic of Peru 895 F.Supp. 660,663 (S.D.N.Y. 1995). In Elliott, it said that "Jorge Camet, Peru's Minister of Economy and Finances, informed IMF officials of the Buyback Program at its inception, Elliott 12 F.Supp.2d at 341, footnote 10.

Therefore, the Respondent was represented in the mentioned contract by the SBC to purchase debts to Propetsa and to Petitioner.

On March 21, 1999, a statement appeared in the main Peruvian newspaper "El Comercio" disclosing full details of participants and amounts involved in Peru's Brady Plan. The details of this disclosure are included with the Exhibits docketed in the District Court. This was not a simple article. It was an official public statement written in the Respondent's format including the official governmental seal and signed by the Respondent's Minister of Economy and Finance. This statement describes how the Respondent represented by SBC purchased Peruvian debts to private creditors through commercial contracts, such as the Petitioner's contract, clearly identifying the Respondent as a party to these contracts.

About this important evidence, the Republic of Peru held that the article was not produced The District Court erred when it held that "Amorrortu has no pled facts tending to show that SBC was merely the alter ego of the Republic of Peru: a reference to a newspaper article making an ambiguous and unsubstantiated claim that such a relationship exists is simply too speculative a basis upon which to deny the Republic of Peru its sovereign immunity." Pet. App. 13a footnote 4.

Also, the aforementioned Peru's Brady Plan disclosure ratified that the debts involved in the Plan were paid with cash or through the issuance of

the Brady Bonds. In Elliott, the Second Circuit held that "[t]he collateral for the Brady bonds was United States Treasury bonds, which were held at the Federal Reserve Bank of New York" Elliott 194 F.3d at 368, and in Weltover, the Supreme Court in the conclusion held that "[w]e conclude that [Peru's] issuance of the Bonods was a 'commercial activity' under the FSIA" Republic of Argentina v. Weltover 504 U.S.607, 620 (1992).

Finally, Peru's Brady Plan was related to Peruvian commercial debts. In Pravin Banker, the Second Circuit denied any appeal from "Banco Popular del Peru ('Banco Popular') and the Republic of Peru ... pending completion of Peru's efforts to renegotiate its commercial debt under the Brady Plan " Pravin Banker 109 F.3d 850, 852 (2nd Cir. 1997).

Due to the aforementioned reasons of facts and law, the Respondent through a contract signed under the Peru's Brady Plan had engaged in commercial activity.

3. There is a nexus with the United States, a connection with the commercial acts of the foreign sovereign, and direct effect in the United States.

In Elliott the S.D.N.Y. Court held that "Peru bought back at substantial discount $1.735 billion in face value of principal, which was approximately 41% of the total $4.2 billion in face value then

outstanding. The total value of the debt Peru repurchased, in principal amount plus accrued interest was $3.5 billion. The buyback was conducted confidentially, and it did not identify itself to any of the sellers" Elliott 12 F.Supp.2d at 341.

In the aforementioned disclosure occurred on March 21. 1999. are mentioned the nexus to the United States of Peru's Brady Plan. the effects of the Plan. and the total amounts involved.

Regarding the origin and amounts to collect included in the contract, the breakdown of the debts and monies owed separately to Petitioner and to Propetsa. are included in the Exhibits docketed in the District Court. This exhibit shows the amounts acknowledged by the Peruvian Comptrollership as Peruvian commercial debts. reviewed, and approved by the Respondent and SBC in the contract under Peru's Brady Plan owed to Petitioner (due to Petitioner's funding to collect the debts). principal owed to Propetsa (due to unpaid oil services furnished to PetroPeru), interests owed to Propetsa (due to the time passed). and taxes owed to the Sunat (due to unpaid taxes to the Peruvian tax collection agencies).

The Respondent is wrong when it held that Petitioner has not alleged facts that show that he, individually. had any commercial dealings with the

Respondent. This aforementioned evidence shows that Petitioner had individual monies to collect through the contract.

In reference to the contract and negotiations, the total amount owed was to be tendered in the following manner: an amount to Petitioner (through a % commission); an amount to Propetsa (debt and interests); an amount to SBC (through a % commission); to be paid in U.S. accounts separately. Petitioner, was always seeking to recover his monies and a profit, seeking individual profit, a commission or bonus, as usually paid to negotiators.

Therefore, the District Court erred when it held that "its best interpretation is that Petitioner, on behalf of Propetsa, sold his right to receive that six million dollars from the Republic of Peru to SBC" Pet. App. 4a and that "the Republic of Peru is not the alleged debtor, [Petitioner] is not the alleged creditor: the debt if any, is owed to Propetsa, not [Petitioner]." Pet. App. 16a.

Under Peru's Brady Plan, executed during 1995 and 1997, the Respondent's debts and claims owed to US commercial banks, private corporations and others were reduced in an amount of US$6.13 Billion. These commercial operations permitted US commercial banks, corporations and others, including Petitioner, to end claims against

Respondent and to recover monies due in cash and / or bonds. The details of these commercial operations are included with the Exhibits docketed in the District Court. In addition, one of the direct effects of this plan in the United States, was that monies recovered were to be reflected in the creditors' financial statements and U.S. tax returns.

Due to the aforementioned reasons of facts and law, the commercial activity exception applies.

C. The waiver exception

Section 1605 § (a)(1) of the FSIA sets forth the "waiver" exception to sovereign immunity

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-

(1) in which the foreign state has waived its immunity either explicitly or by

implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver... 28 U.S.C. §1650(a)(1).

The District Court erred when it held that "the Republic of Peru has actively taken part in the litigation by requesting extensions and filing this

Motion is insufficient to establish a waiver" Pet. App 10a. and mentions a case related to the problems of a Peru's vessel named Ucayali occurred in USA in 1942, Ex Parte Republic of Peru. 318 U.S. 578.589 (1943), and omitted the fact that in 1995 the Respondent was a party in Peru's Brady Plan and a party in a contract under this Plan.

The FSIA of 1976 established the mentioned waiver exception. In this particular case, the Respondent represented by the SBC is a party in the contract governed by the Laws of the State of New York. This represents an implied waiver of the Respondent to its sovereign immunity and accepted the New York law in the contract as part of Peru's Brady Plan to purchase Peruvian debts.

In Siderman, "[I]mplied waiver exception was applicable based on allegations that Argentina availed itself of United States courts in its pursuit of Plaintiff." Siderman de Blake v. Republic of Argentina. 965 F.2d 699 (9th Cir. 1992), and then it said "With respect to implicit waivers. the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state [Respondent] has agreed that the law of a particular country [New York Laws] should govern contract." Siderman F.2d at 721. This source applies in this case where the

Respondent represented by SBC agreed that the law of the State of New York governs the contract. Due to the aforementioned reasons of facts and law. the waiver exception to the FSIA applies.

D. The expropriation exception

Section § 1605(a)(3) of the FSIA sets forth the "expropriation" exception to sovereign immunity:

(a)A foreign state shall not be immune from the jurisdiction of courts of the United States in any case-

...

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States...

28 U.S.C. § 1605(a)(3).

In Zappia, "in order to establish jurisdiction pursuant to the FSIA expropriation exception, a Plaintiff must show that: (1) rights in property are in issue; (2) that the property was 'taken'; (3) that the taken was in violation of international law; and (4) that one of the two nexus requirements is satisfied." Zappia Middle East Construction Company Limited. v. The Emirate of Abu Dhabi. 215 F.3d 247,251(2nd Cir. 2000).

In reference to the best interpretation of the expropriation exception to the FSIA in this case. the question is whether a contract unfulfilled, due to political reasons, by the Respondent represented by SBC. under Peru's Brady Plan, in which there was Petitioner's amounts involved. represents an expropriation exception to the FSIA. The court of appeals erred in holding the District Court's reasons when it omitted these aforementioned facts in its analysis.

Following are the four mentioned steps:

First,. there exists evidence that Petitioner had personal monies to recover in the contract and it represents rights in property; therefore, rights in property are in issue.

Second. the Respondent. represented by SBC in the contract, did not pay Petitioner, representing a confiscation of his right to property; therefore, the property was taken.

Third, the Respondent, represented by SBC, did not pay Petitioner due to political reasons, because Petitioner had become a serious and significant contender for the Peruvian presidency, against the repressive regime of the Peru's President Fujimori, in such representing a violation of international law, acknowledged by the United States in the political asylum ruling granted to Petitioner; therefore, the monies not paid represents a violation of international law.

Finally, there exists evidence that the contract was one of the contracts involved in Peru's Brady Plan signed to purchase Peruvian commercial debts; therefore, there exists a nexus of commercial activities with the United States.

Due to these aforementioned reasons of facts and law, the expropriation exception to the FSIA applies.

In a recent case reviewed by the Court of Appeals for the Eleventh Circuit related to the repressive regime of Peru's President Fujimori, the FSIA, and the capture of the most important Fujimori advisor and regimen partner, Montesinos, the court held that "[t]his appeal presents the issue of whether a foreign state's offer of a reward in return for information enabling it to locate and capture a fugitive falls within the Foreign Immunity Act's

commercial activity exception to sovereign immunity. For the reasons that follow, we conclude that it does" Jose Guevara v. Republic of Peru. 468 F.3d 1289. 1292 (11th Cir.2006).

E. There exists evidence that in Petitioner's claims there are different statutes of limitations and reasons for tolling the statutes of limitations

The Court of Appeals erred in holding the reasons stated by the district court which held that "the Court would undoubtedly find that [Petitioner's] claims under New York law are time-barred." Pet.App.5a. Footnote4.

Also, the Court of Appeals erred in holding the reasons stated by the district court which omitted to consider identified facts during the Petitioner's political asylum process, when the cause of action accrued, and how these facts toll the statute of limitations[2].

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[2] "See N.Y. C.P.L.R. § 213(2)(six-year statute of limitations for breach of a written contract: N.Y. C.P.L.R. §214(4)(three-year statute of limitations for an action to recover damages for an injury to property). N.Y. C.P.L.R. §214(5)(relating to late-discovered causes of injury), see also Fury Imports, Inc. v. Shakespeare Co., 625 F.2d 585, 587 (5th Cir. 1980)(applying New York law to find a three-year statute of limitations for claims of tortious interference with a contract, citing, inter alia,

In this case the actions accrued on different dates: the contract is dated is October 27. 1995: the termination letter or breach of contract is dated December 19, 1996; the late discovery of injury is dated March 21, 1999: the filing of the complaint for political asylum is dated March 09, 2000, and the two hearings before an Immigration Court are dated May 22, and June 19, 2000; and the final action of the political asylum process is dated August 23. 2005, when the Petitioner received his Lawful Permanent Resident status. Prior to this date. that is during the five years of the political asylum process which means "protection", Petitioner was unable to file a complaint against the Respondent before the United States courts. This aforementioned Lawful Permanent Resident decision is included with the Exhibits docketed in the District Court.

The statute of limitations requires that the following must be taken into account: when the cause of actions accrued: and if such accrual tolls the statute. In Fury. the court analyzing the statute of limitations held "when [Petitioner's] cause of action accrued under New York law. and whether any reason exists for tolling the statute"

N.Y.C P.L R. §214(4)). cert.denied.450 U.S.921(1981) "(footnote 2 Roa. at 378. 379)

Fury 625 F.2d at 586. The decision below did not do this. In this case, considering the dates of the aforementioned facts, the question is whether or not the Petitioner's political asylum process, which means "protection", has run the statute of limitations, and whether these facts which include the hearings before an Immigration Court, are considered to toll the statute. Therefore, considering the aforementioned dates of the political asylum process, and that the facts related to the contract were stated in the political asylum complaint, the statute of limitations has been tolled, and the Petitioner's claims under the New York law are not time-barred.

In addition, considering that the Petitioner is a victim of cruel political persecution executed by the Respondent, extremely damaged, and trapped, and that he has brought this case including two counts in the complaint: pain and suffering; and economical torture; the court should apply the 28 U.S.C. §1350 Torture Victim Protection Pub. L. 102-256, Mar.12, 1992,106 Stat. 73, which provides that:

"Sec.2 Establishment of civil action '(c) Statute of Limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose'".

Finally, the statute of limitations is not time-barred for human rights violations, as is the case of the political persecution executed by the Respondent against Petitioner in the United States through different actions. One of these occurred on December 5, 1996, in a meeting in the office of SBC's New York Headquarters, where Petitioner was told that SBC could not pay Petitioner nor Propetsa due to political reasons in relation to an order received from the repressive regime of Peru's President Fujimori, which represents a clear human rights violation against the Petitioner.

Due to the aforementioned reasons of facts and law, the Petitioner's claims are not time-barred.

III. The decision below has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The Court of Appeals erred in not ruling to permit the Petitioner as a pro se Plaintiff to remand the complaint to clarify the facts occurring in the United States, which are the basis in proving exceptions to the FSIA in this case, about which the District Court stated "[t]he Court is not entirely clear about the meaning of these allegations" Pet. App. 4a. in reference to the contract signed by the

Petitioner with the Respondent represented by the commercial bank SBC during Peru's Brady Plan under the Laws of the State of New York.

In Steele, the United States Supreme Court held that a pro se Plaintiff as the Petitioner is "entitled to have his complaint liberally construed" Steele v. Gamble 429 U.S. 97,106 (1976) and following the United States Supreme Court in the Conley case held "that under the general principles laid down in the Steele, Graham, and Howard cases the complaint adequately set forth a claim upon which relief could be granted. In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson 355 U.S 41. 45, 46 (1957).

Further in Conley. the United States Supreme Court held that "the Federal Rules of Civil Procedures do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim'" and "Following the simple guide of Rule 8 (f) that 'all pleadings shall be so construed as to do substantial justice,' we

have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis" concluding that "The judgment is reversed and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion." Conley v. Gibson 355 U.S. 41, 47. 48 (1957).

Also, in Haines, the United States Supreme Court held that "the allegations of the pro se complaint ...we hold to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner 404 U.S. 519, 520 (1972).

. Finally. the Court of Appeals did not rule on the fact that the District Court omitted to consider the evidences filed by the Petitioner as pro se Plaintiff during the Evidentiary Hearing held on July 10. 2007 which are included in the Exhibits docketed in the District Court. In Haines. the United States Supreme court held that "the District Court erred in dismissing his pro se complaint without allowing him to present evidence on his claim" and "that he is entitled to an opportunity to offer proof." Haines v. Kerner 404 U.S. 519. 520. 521 (1972).

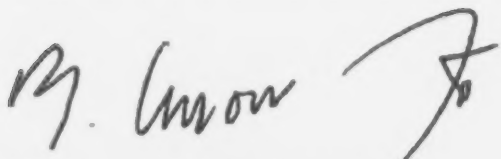
Therefore, given that the Petitioner as pro se Plaintiff has filed evidence in support of the facts that occurred in the United States and given that the Court of Appeals and District Court omitted to

consider this evidence and given that the United States Supreme Court has held that such evidence should be "liberally construed", "short and plain", "construed as to do substantial justice" and "held to a less stringent standard" the Petitioner as pro se Plaintiff should be permitted to explain the evidence filed in the record and to remand his complaint to clarify the facts that occurred in the United States related to the contract signed by the Petitioner during the Peru's Brady Plan under the Laws of the State of New York. This evidence should not be omitted in the considerations, conclusions and reasons for the Court's decision and the case should not be dismissed.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,



BACILIO A. AMORRORTU
2402 South Voss Rd.
Apt. B-301
Houston, Texas 77057
Petitioner
PRO SE

Monday, August 24, 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BACILIO A. AMORRORTU,

Plaintiff,

v.

REPUBLIC OF PERU

Defendant.

CIVIL ACTION No. H-06-4012

MEMORANDUM AND ORDER

Before the Court is Defendant's Motion to Dismiss the Complaint (Doc. No. 23). The Motion requests dismissal under Federal Rules of Civil Procedure 12 for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim; the Motion also argues

that the Complaint should be dismissed because it has been file in an inconvenient forum. After carefully considering the Motion, the responses and replies thereto, and all applicable law, the Court finds that it lacks subject matter jurisdiction under rule 12(b)(1) and the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§1602 *et seq.*, and therefore the case must be dismissed.

I. BACKGROUND

Pro Se Plaintiff Bacilio A. Amorrortu ("Amorrortu") files this lawsuit against Defendant Republic of Peru making the following claims: "Political Persecution." "Confiscation of Assets and Loss of Opportunities," "Misconduct and Negligence," "Pain and Suffering," and "Economical Torture." (Compl. Doc No. 1, at 9-11.) In total, Plaintiff seeks to recover $37 million, plus costs, for his alleged injuries. (Compl. Doc. No. 1, at 11). According to his Complaint, the factual bases for these allegations are as follows:

1. Non-Payment of Debts

Since at least 1992, Propetsa, an oil company, has allegedly been owed a debt of six million dollars (US) by PetroPeru, another oil company. (Compl., Doc. No. 1, at 3) Amorrortu, writing in the third person, describes Propetsa as having been "his oil company" at the times the alleged debt accrued and came due, and he

describes PetroPeru as having been the "Peruvian State oil company" at those times. (Compl., Doc No. 1, at 3.) The origins of this debt are not clearly explained in the Complaint. Amorrortu alleges that the "Peruvian State Comptrollership," apparently a Peruvian auditing authority, acknowledged this debt on the behalf of the Republic of Peru on June 5, 1992 when it issued a "Special Analysis." (Compl., Doc. 1, at 4.) Nonetheless, Defendant Republic of Peru, which Amorrortu alleges was responsible for this debt, has not paid Propetsa this money. (Compl., Doc. No. 1, at 4.) Amorrortu describes this non-payment as "a confiscation act." (Compl., Doc. No. 1, at 3-4), and alleges that its result was that Propetsa was unable to "participate in the purchase of profitable PetroPeru units under a privatization process in the period of 1992 to 1996." (Compl., Doc. No. 1, at 4.) In 1995, Amorrortu alleges, he unsuccessfully sought redress on behalf of Propetsa in Peruvian courts by filing a lawsuit for forty million dollars (U.S.) against PetroPeru. (Compl., Doc. No. 1, at 4.) According to the Complaint, Amorrortu did not prevail in his case, but he attributes the negative result of his case to the shortcomings of the

"corrupt" and "inefficient" Peruvian judiciary. (Compl., Doc. No. 1, at 4, citation omitted.)[3]

Also in 1995, Amorrortu, acting as President and CEO of Propetsa, allegedly signed an agreement with Swiss Bank Corporation ("SBC") under the law of New York relating to PetroPeru's debt. (Compl., Doc. No. 1, at 4-5.) According to the Complaint, the agreement was effected under "The Peruvian Brady Plan," which "permitted... the Peruvian State to solve [sic] and pay claims to private companies," and it provided for SBC to "assume[] 'the Claims' to pay to Propetsa [sic]." (Compl., Doc. No. 1, at 4-5.) The Court is not entirely clear about the meaning of these allegations, but its best interpretation is that Amorrortu, on behalf of Propetsa, sold his right to receive the six million dollars from the Republic of Peru to SBC. According to the Complaint, "months later," an "SBC banker told Amorrortu that the Peruvian State did not want SBC to pay Propetsa due political reasons [sic]." (Compl., Doc. No. 1, at 5.) Amorrortu alleges that

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3 As further evidence of the inadequacy of the Peruvian judiciary, Amorrortu notes that, when he was allegedly "unlawfully" fired from Propetsa's Chairman chair" in 1999, he again turned to the Peruvian courts for redress, but was similarly unsuccessful. (Compl., Doc. No. 1, at 4.) By way of explanation, he states, "The Peruvian Judiciary is corrupt. In Peru there is not Justice." (Compl., Doc. No. 1, at 4.)

he responded by asking SBC to "pull out from Peru his expensive oil rigs to be moved to Houston, Texas," apparently because he was afraid they would be confiscated. (Compl. Doc. No. 1, at 5.) In December of 1996, SBC allegedly responded by unilaterally terminating the agreement over Amorrortu's objections. (Compl., Doc. No. 1, at 5). Subsequently, on March 21, 1999, Amorrortu alleges that an article "appeared in the main Peruvian newspaper a public Peruvian State advertising disclosing [sic] that SBC was a solely Peruvian State agent during the Peruvian Brady Plans negotiations during the period of time 1994-1997." (Compl., Doc. No. 1, at 5.)[4]

According to the Complaint, Amorrortu's concern that Propetsa's assets would be

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4 In its analysis of the Republic of Peru's immunity under the FSIA, the Court will address Amorrortu's complaints regarding his alleged contract with SBC in New York. The Court notes, however, that is this case were in its jurisdiction, the Court would undoubtedly find that Amorrortu's claims under New York law are time-barred. *See* N.Y. C.P.L.R. §213(2) (six-year statute of limitations for breach of a written contract), N.Y. C.P.L.R. §214(4) (three-year statute of limitations for an action to recover damages for an injury to property), N.Y. C.P.L.R. §214(5) (relating to late-discovered causes of injury); *see also Fuzy Imports, Inc. v. Shakespeare Co.*, 625 F.2d 585, 587 (5th Cir. 1980) (applying New York law to find a three-year statute of limitations for claims of tortious interference with a contract, citing, *inter alia*, N.Y. C.P.L.R. §214(4)), *cert. Denied*, 450 U.S. 921 (1982).

confiscated came to fruition, although the Complaint is unclear about the timeline of confiscation. (Compl . Doc. No. 1, at 5-6.) Propetsa was allegedly "shut[] down completely in 1996," and from 1999 to 2006, he alleges, the Republic of Peru sold the confiscated assets, including oil rigs and oil equipment. (Compl., Doc. No. 1, at 6.) He further alleges that, in 2005, the Republic of Peru "executed or permitted the demolition of the expensive 3 acre Propetsa's Shop-Plant." (Compl., Doc. No. 1, at 6.) It bears mention that Amorrortu's complaint alleges that he was "unlawfully fired from Propetsa's Chairman chair" in 1999 (Compl., Doc. No. 1, at 4), after which time Amorrortu alleges he remained a shareholder with a 26% stake in the company. (Compl . Doc. No. 1, at 9). Amorrortu's lawsuit, however, is brought solely in his individual capacity. (Compl., Doc. No. 1, at 1.)

2. Political Persecution

Amorrortu also bases his claims on the alleges political persecution he has suffered as a result of his activities as the leader of a political party in Peru, "En Accion." (Compl., Doc. No. 1, at 6.) He claims that his efforts to run for the presidency of Peru were thwarted in 1992, when his petition to join the race was allegedly rejected by the state and on appeal by the Organization of American States, and again in 1994, although the

circumstances of these latter efforts are unclear from the Complaint. (Compl., Doc. No. 1, at 6-7.) Amorrortu further alleges that the Peruvian government "implemented a cruel plan of economical [sic] deterioration" that prevented him from earning income or finding work. (Compl., Doc. No. 1, 6-7.) The Complaint does not offer any further details about how the Republic of Peru did so. It is notable, however, that according to the Complaint, Amorrortu alleges that he is now a political asylee in the United States. (Compl., Doc. No. 1, at 1.)

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 12(b)(1) governs challenges to a court's subject-matter jurisdiction. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Circ. 1998) (quotation omitted). "Courts may dismiss for lack of subject matter jurisdiction on any one of three bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Clark v. Tarrant County*, 798 F.2d 736, 741 (5th Cir. 1986) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). The

plaintiff bears the burden of demonstrating that subject-matter jurisdiction exists. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

The FSIA provides the sole source of subject matter jurisdiction in suits against foreign state. *Dale v. Colagiovanni*, 443 F. 3d 425, 427-28 (5th Cir. 2006) (*citing Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-39 (1989)). "'The general rule under the FSIA is that foreign states are immune from the jurisdiction of the United States Courts.'" *Id.* At 428 (*quoting Byrd v. Corporacion Forestal y Industrial De Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999)). "'However, a district court can exercise subject matter jurisdiction over a foreign state if one of the statute's exceptions apply.'" *Id.* (*quoting Byrd*, 182 F.3d at 388" Moreover, the Court must begin with a presumption of immunity from suit. *Permanent Mission of India v. City of N.Y.*, 127 S. Ct. 2352, 2355 (2007) ("Under the FSIA, a foreign state is presumptively immune from suit unless a specific exception applies."): while the party claiming immunity carries the ultimate burden of persuasion to show immunity, once it makes a prima facie showing of immunity, the burden shifts to the plaintiff to show that one of the exceptions to immunity exists. *United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir. 1992).

III. ANALYSIS

There is no dispute in this case that Defendant Republic of Peru is a foreign sovereign and thus enjoys general immunity under the FSIA. The question in establishing the Court's subject matter jurisdiction is therefore whether one of the FSIA's exceptions to general immunity applies in this case. For the reasons that follow, the Court finds that none of the four exceptions relevant to this case applies, and consequently the Court lacks subject matter jurisdiction to hear the lawsuit.

A. The Waiver Exception

Section 1605(a)(1) of the FSIA sets forth the "waiver" exception to sovereign immunity:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–
>
> > (1) in which the foreign state has waived its immunity either explicitly of by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver ..

28 U.S.C. § 1605(a)(1). There is no implication whatsoever that the Republic of Peru has waived

its sovereign immunity in this case.[5] In fact, it has explicitly objected to the Court's jurisdiction in every filing it has made to date. Moreover, that the Republic of Peru has actively taken part in the litigation by requesting extensions and filing this Motion is insufficient to establish a waiver. *See Ex Parte Republic of Peru*, 318 U.S. 578, 589 (1943).

B. The Commercial Activity Exception

Section 1605(a)(2) of the FSIA sets forth the "commercial activity" exception to sovereign immunity:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–
>
> (2)in which the action is based upon a commercial activity carried on in the United States by the foreign state: or

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5 The case cited in Amoriortu's Response (Doc No 29, at p. 17). *Siderman de Blake v. Republic of Argentina*, 965 F 2d 699 (9th Cir 1992). is not to the contrary That case found an implied waiver of sovereign immunity where the foreign sovereign had previously brought a related lawsuit in a the United States, thereby availing itself of the U.S. Court system *Id.* At 720 The *Siderman* court also noted that the foreign sovereign "did not controvert the [plaintiff's] implicit waiver argument in the district court," and that "the only material before us on the subject of waiver is that presented by the [plaintiff]." and that, "[o]n remand, [the foreign sovereign] will have an opportunity to rebut the [plaintiff's] evidence. "*Id* None of these circumstances apply to the instant lawsuit Moreover, *Siderman* is a Ninth Circuit case and is not binding on the Court

> upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere: or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States...

28 U.S.C. § 1605(a)(2). In interpreting this exception, the Fifth Circuit has held, "Foreign sovereigns are not immune from judicial process in actions based upon commercial activity that has a jurisdictional nexus with the United States, as defind by the FSIA." *Can-Am Intn'l v. Republic of Trinidad and Tobago*, 169 Fed. App'x 396, 404 (5th Cir. 2006), cert Denied 127 S. Ct. 189 (2006) (*citing Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo del Sindicato Revolucionario de Trabajadores de la Republica Mexicana S.C.*, 923 F.2d 380, 386 (5th Cir. 19991)). The Fifth Circuit explained:

> In order to decide whether the commercial activity exception applies, first, the relevant activity must be identified. "This requires focusing on the acts of the named defendant, not on other acts that may have had a casual connection with the suit. In particular, we must isolate those specific acts of the named defendant that form the

basis of the plaintiff's suit." *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1391 (5th Cir. 1985) (citation omitted).

Second, the court must determine if the relevant activity is sovereign or commercial. The statutory definition of "commercial activity" is "either a regular course of commercial conduct of a particular commercial transaction or act." 28 U.S.C. § 1603(d). The second sentence of § 1603(d) directs the courts to look at the "nature" of an activity rather than its "purpose" in determining whether it is commercial. This, the Supreme Court has defined an activity as having a commercial nature for purposes of FSIA immunity if it is of a type that a private person would customarily engage in for profit. [*Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992[]; *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1108 n.6 (5th Cir. 1985). A foreign government's acts may be deemed commercial when that foreign government is not acting "as a regulator of the market, but in the manner of a private player within it." *Weltover*, 504 U.S. At 614, 112 S. Ct. 2160.

Finally, if the relevant activity is commercial in nature, the court must determine whether it had the requisite jurisdictional nexus with the United States.

...

Stena further states, "[n]ot only must there be a jurisdictional nexus between the Unites States and the commercial acts of the foreign sovereign, there must be a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign." [*Stena*, 923 F.2d at 386.] *Id.* at 404-05 (footnotes omitted).

The relevant activities of the Republic of Peru are those that give rise to Amorrortu's claims, namely, the Republic of Peru's non-payment of PetroPeru's alleged debt to Propetsa, its alleged confiscation and destruction of Propetsa's assets, and its alleged political persecution of Amorrortu.[6]

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6 As for the allegations that SBC "assume[] 'the Claims' to pay to Propetsa [sic]" (Compl., Doc. No. 1, at 4-5) and then breached that agreement, the Court notes that this alleged agreement was between Propetsa and SBC, not Amorrortu and the Republic of Peru. SBC is not a defendant in this lawsuit, and Amorrortu has sued neither SBC nor the Republic of Peru for breach of contract. Amorrortu has not pled facts tending to show that SBC was merely the alter ego of the Republic of Peru, a reference to a newspaper article making an ambiguous and unsubstantiated claim that such a relationship exists is simply too speculative a basis upon which to deny the Republic of Peru its sovereign immunity. Moreover, the acts of an agent in the United States cannot be attributed to a foreign sovereign for purposes of sovereign immunity. "It is the acts of the foreign government that determine whether the foreign acts are commercial within the meaning of the FSIA." *Can-Am Int'l*, 169 Fed. App'x at 405-06.

As a preliminary matter, the Court notes that the alleged political persecution of Amorrortu, which Amorrortu describes as involving ballot exclusion and a plan to deprive Amorrortu of a job and income, is not commercial activity. It is neither a regular course of commercial conduct or a particular commercial transaction or act, and no private person would engage in these kinds of activities for profit. Even though these allegations, if true, would amount to an injustice of the highest order, it is clearly the injustice of a sovereign and therefore outside the scope of the commercial activity exception. *See Saudia Arabia v. Nelson*, 507 U.S. 349, 362 (1993) ("[A] denial of justice ... cannot be performed by an individual acting in his own name. [It] can be performed only by the state acting as such.").

As to Amorrortu's complaints of confiscation and destruction of Propetsa's assets and the non-payment of debts owed to Propetsa, the Court also finds that Amorrortu has failed to allege facts that satisfy the commercial activity exception to the FSIA. To begin with, confiscation and expropriation are not commercial actions, for they are not actions of a nature that a private person would, or could, engage in for profit. *See, e.g., Rong v. Liaoning Prov. Gov't*, 452 F. 3d 883, 889-91 (D.C. Cir. 2006); *United Mexican States v. Ashley*, 556 S.W.2d. 784, 786 (Tex. 1977) (*citing*

Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 704 (1976)).

As for the non-payment of debts, the origin of the alleged debt is not clearly explained in the Complaint, making it impossible for the Court to find that Amorrortu has succeeded in establishing the Court's subject matter jurisdiction under the commercial activity exception to the FSIA. It is clear, however, that Amorrortu has failed to demonstrate that this case involves the simple non-payment of a contractual or other commercial debt owed by the Republic of Peru itself, but by PetroPeru. Even if the Court assumes, as it must for purposes of this motion, that PetroPeru is an oil company wholly-owned by the Republic of Peru, its actions in a commercial market are not attributable to the Republic of Peru itself for purposes of sovereign immunity. *First Nat'l City Bank v. Banco Para El Comercio*, 462 U.S. 611, 626-27 (1983) (hereinafter "*Bancec*") (for purposes of the FSIA, "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such").[7] Amorrortu has not made any

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7 "Although *Bancec*'s description of the basis for disregarding the separate juridical status of foreign agencies occurred in a discussion of substantive liability, its principles have been applied to FSIA jurisdictional issues. *See Foremost-McKesson, Inc. v. The Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990). *Hester*

factual or other allegation that PetroPeru was the alter ego of the Republic of Peru, nor has he offered allegations showing that a representative of the Republic of Peru directed the actions of PetroPeru. *See Dale*, 443 F.3d at 429 (a plaintiff can overcome the presumption of independence in certain circumstances by showing that "the state exercises day-to-day control over the agency"). Moreover, the Republic of Peru has not attempted to avail itself of United States law to effect any similar or related recovery from either Propetsa or Amorrortu, *see Bancec*, 462 U.S. At 663-34 (recognizing "the injustice that would result from permitting a foreign [entity] to reap the benefits of our courts while avoiding the obligations of international law"). In addition, just as the Republic of Peru is not the alleged debtor, Amorrortu is not the alleged creditor; the debt, if any, is owed to Propetsa, not Amorrortu. By his own admission, Amorrortu is no longer the president, chief executive officer, or chairman of Propetsa, he is a shareholder with a 26% stake who is suing in his individual capacity. (Compl., Doc. No. 1, at 9.) Not only do these attenuated relationships between the parties and the actions

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Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 176 (5th Cir. 1989); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F. 2d 528, 533 (5th Cir. 1992)

complained of violate the formal requirement that the suit arise out of the actions of the named defendant." *Can-Am Int'l.* 169 Fd. App's at 404. but they preclude a finding that there is a sufficient connection between Amorrortu's cause of the action and the commercial acts of the Republic of Peru, *id.* At 405.[8]

C. The Expropriation Exception

Section 1605(a)(3) of the FSIA sets forth the "expropriation" exception to sovereign immunity:

> **(a)** A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–
>
> > (3)in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state: or that property or any

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8 . The Court further notes that, with the exception of the alleged agreement between Propetsa and SBC under the laws of New York. an agreement to which Amorrortu admits he was not a party and upon which Amorrortu has brought no breach of contract claim. none of the actions complained of took place in the United States, nor did they have any different effect in the United States The Court is unaware of any other nexus to the United States that would be sufficient to establish jurisdiction. *Can-Am Int'l.* 169 Fed App's at 404 (*citing Siena*, 923 F 2d at 386)

> property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States...

28 U.S.C. § 1605(a)(3).

Therefore, under the expropriation exception to the FSIA, a plaintiff must show that rights in property are in issue, that the property was taken in violation of international law; and that one of the two nexus requirements is satisfied. *Id.; see also Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000). The allegations in the Complaint, when assumed to be true and given the benefit of every reasonable inference, do not suffice to show that this case is within the expropriation exception. As noted above, the Court is not convinced that any rights in property are actually in issue: the rights complained of appear to be those of Propetsa, whereas the complainant is shareholder Amorrortu, proceeding individually. Even if the rights are Amorrortu's to assert, the Complaint does not establish that the rights were "taken": the property in question was allegedly confiscated to satisfy a debt of unknown origin–a debt, it bears mention, that by Amorrortu's own admission was upheld as valid by the (allegedly corrupt)

Peruvian courts. Moreover, Amorrortu's allegations are insufficient to support a finding that either of the two nexus requirements is satisfied. The property in question–that which has not been destroyed–is and has always been in Peru, and Amorrortu makes no allegation that the remaining property is owned or operated by an agency or instrumentality of the Republic of Peru that is engaged in a commercial activity in the United States. Based on these allegations the inferences required to find that Amorrortu has carried his burden to show that the expropriation exception to the FSIA applies cannot reasonably be drawn.

D. The Non-Commercial Tort Exception

Section 1605(a)(5) of the FSIA sets forth the "non-commercial tort" exception to sovereign immunity:

> **(a)** A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–
>
> ...
>
> **(5)** not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occuring in the United States and caused by the tortious

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act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to–

(A) any claim based upon the exercise or perfomance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights...

28 U.S.C. § 1605(a)(5). On its face, this exception applies only to cases in which the damage or loss of property occurs in the United States. *Id.*; *see also Amerada Hess Shipping Corp.*, 488 U.S. At 439 ("Section 1605(a)(5) is limited by its terms... to those cases in which the damage or loss of property occurs in the United States."). According to the Complaint, none of Amorrortu's alleged personal injuries, nor any of the alleged damage to or loss of his property, occurred in the United States.[9] Therefore, the non-commercial torts exception to the FSIA in inapplicable.

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9 To the extent that Amorrortu intends to allege that the Republic of Peru interfered with his contract rights in his agreement with SBC in New York, the Court would note that "interference with

IV. CONCLUSION

The Court harbors no doubts that Amorrortu's complaints about his treatment by the Republic of Peru are voiced in earnest, and that his feelings of aggrievement are real. This Court, however, may not act in the absence of jurisdiction, and Amorrortu has not carried his burden of showing that one of the exceptions to the FSIA's grant of sovereign immunity applies. Therefore, Defendant Republic of Peru's Motion to Dismiss the Complaint (Doc. No. 23) is **GRANTED**, and the case is **DISMISSED** for lack of subject matter jurisdiction.

IT IS SO ORDERED

SIGNED at Houston, Texas, on this the 31st day of July, 2008.

KEITH P. ELLISON

UNITED STATES DISTRICT JUDGE

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contract rights" is expressly outside the scope of the non-commercial torts exception. 28 U.S.C. § 1605(a)(5)(B).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BACILIO A. AMORRORTU,

Plaintiff,

v.

REPUBLIC OF PERU

Defendant.

CIVIL ACTION No. H-06-4012

FINAL JUDGMENT

Pursuant to FED. R. CIV. P. 58(a) and today's Memorandum and Order (Doc. No. 31). this case is hereby **DISMISSED**.

IT IS SO ORDERED.

SIGNED at Houston, Texas on this the 31st day of July, 2008.

KEITH P. ELLISON

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20565
Summary Calendar

BACILIO A. AMORRORTU, individually,

victim of political persecution

Plaintiff-Appelant

v.

REPUBLIC OF PERU

Defendant- Appellee

Appeal from the United States District Court

for the Southern District of Texas

4:06-CV-4012

Before DAVIS, GARZA and PRADO, Circuit Judges
PER CURIAM:*

Bacilio A. Amorrortu appeals the dismissal of his claims for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1). For the reasons stated by the district court, we conclude that Amorrortu has failed to allege a sufficient basis for jurisdiction under the Foreign Sovereign Immunities Act. See 28 U.S.C. §1605.

Accordingly, we AFFIRM

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* Pursuant to 5th CIR R 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20565
Summary Calendar

D.C. Docket No. 4:06-CV-4012

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REPUBLIC OF PERU

Defendant- Appellee

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Before DAVIS, GARZA and PRADO, Circuit Judges

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appelant pay to defendant-appelle the costs on appeal to be taxed by the Clerk of this Court

ISSUED AS MANDATE·